limited to, a construction permit, license, license renewal, franchise, etc., for the operation of a broadcast television station, cable franchise or other facility or arrangement for providing television programming to the public from the Federal Communication Commission or from any other Federal, state or local authority shall be denied or withdrawn from any licensee, broadcaster or other programming provider upon a finding by the appropriate authority that such party has followed, is following, or proposes to follow, a policy or practice of broadcasting or transmitting television programming containing an excessive amount of dramatized violence between the hours of 6:00 a.m. and 10:00 p.m.

(b). For purposes of this section, television programming contains an excessive amount of dramatized violence if it contains dramatized portrayals of killings, rapes, maimings, beatings, stranglings, stabbings, shootings, or any other acts of violence which, when viewed by the average person, would be considered excessive or inappropriate for minors.

(c). For purposes of this section, "violence" means the use or threatened use of physical force against another or against one's self, whether or not such act or threat occurs in a realistic and serious context or in a fantastic and humorous context. Idle threats, verbal abuse, and gestures without credible violent consequences are not "violence" for purposes of this section.

(d). For purposes of this section, "an excessive amount of dramatized violence" means an amount of dramatized violence inappropriate for minors or exceeding that permitted by the guidelines developed by the Commission pursuant to paragraph 7 of this section.

2. Telecasters shall provide appropriate advisories, both audio and visual, to warn viewers of any programming containing an excessive amount of dramatized violence telecast between the hours of 6:00 a.m. and 10:00 p.m. Such advisories shall explicitly refer to the violent content of the particular programming. Such advisories shall be shown at the beginning of any such programming, as well as at the conclusion of all commercial breaks during any such programming.

3. Telecasters shall superimpose an appropriate visual warning signal over any

programming containing an excessive amount of dramatized violence telecast between the hours of 6:00 a.m. and 10:00 p.m., which signal shall remain visible for the duration of the programming.

4. Telecasters shall not telecast commercial advertisements or promotions for upcoming programming between the hours of 6:00 a.m. and 10:00 p.m., which advertisements or promotions contain an excessive amount of violence.

5. Telecasters shall promulgate a set of common standards for classifying programming on the basis of violent content which shall be made public and available to all interested parties, published in generally available program guides, and displayed on-screen immediately prior to the transmittal of the programming to which it pertains. All telecasters shall classify their programming according to the programming classification standards required by this paragraph. The standards shall be developed in consultation with the Commission and interested media-oriented public interest groups.

6. Telecasters shall develop programming designed to educate and inform children about the implications and effects of violence, violent behavior, and the effects of exposure to television violence. Telecasters shall also conduct or sponsor activities designed to enhance the value of such programming.

7. The Commission will convene hearings and solicit public comment on the issue of televised violence, after which the Commission will promulgate guidelines on programming containing dramatized violence telecast between the hours of 6:00 a.m. and 10:00 p.m., which guidelines shall provide telecasters with a clear understanding of their responsibilities.

A. The Case for Regulating Televised Violence Has Become Compelling Since the Commission's Initial Decision in the 1970's to Tentatively Rely on Industry Self-Regulation.

51. The reasons the Commission declined to regulate

televised violence when it first considered the issue in the 1970's are no longer valid. In 1972, in its Corey ruling, the Commission declined to act on a complaint about violence in children's programming because the Commission considered the effects of televised violence on children still unknown.[97] However, since Corey the harmful effects of televised violence on children have become well-known in the scientific community.[98] In light of the evidence now available, the Commission should reconsider its twenty year-old reasoning.

52. In its 1975 Report on the Broadcast of Violent, Indecent, and Obscene Material, the Commission declared, "Regulatory action to limit violent and sexually-oriented programming which is neither obscene nor indecent is less desirable than effective self-regulation, since government-imposed limitations raise sensitive First Amendment problems."[99] Note that this argument assumed industry self-regulation would be effective. In the same Report, the Commission referred to guidelines then recently proposed by the National Association of Broadcasters (NAB) as "going a long way toward establishing appropriate protections for children from violent and sexually-oriented material."[100] The Report continues in the same overly-optimistic fashion,

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[97]In Re Corey, 37 F.C.C.2d 641, 642, 644 (1972).
[98]See, e.g., Am. Acad. of Pediatrics, Comm. on Communications, Children, Adolescents, and Television, 85 Pediatrics 1119-20 (1990).
[99]51 F.C.C.2d 418, 420 (1975); and see Part III hereof supra.
[100]Id. at 422.

"This new commitment suggests that the broadcast industry is prepared to regulate itself in a fashion that will obviate any need for government regulation in this sensitive area."[101] However, as many recent studies show, the need for governmental action to regulate televised violence is, if anything, even greater today than in 1975.[102]

53. An agreement on televised violence announced by ABC, CBS and NBC in December of 1992 should not be cause for false optimism similar to that entertained by the Commission in 1975.[103] On June 21, 1990, the NAB announced that it had "approved a statement of principles for radio and television broadcasting that addresses four key areas: children's TV, indecency and obscenity, violence, and drugs and substance abuse."[104] This "Statement of Principles" reads in part as follows:

> SPECIAL PROGRAM PRINCIPLES
>
> 1. Violence.
>
> Violence, physical or psychological, should only be portrayed in a responsible manner and should not be used exploitatively. Where consistent with the creative intent, programs involving violence should present the consequences of violence to its victims and perpetrators.
>
> Presentation of the details of violence should avoid the excessive, the gratuitous and the instructional. The use of violence for its own

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[101] Id.

[102] See G. Gerbner & N. Signorielli, Violence Profile 1967 Through 1988-89: Enduring Patterns (1990); Neil Hickey, How Much Violence?, 40 TV Guide No. 34, 10 (1992).

[103] See TV Networks Set Standards on Violence, Boston Globe, Dec. 12, 1992.

[104] Nat'l Assoc. of Broadcasters, 88/90 News at 1 (June 21, 1990).

> sake and the detailed dwelling upon brutality or physical agony, by sight or by sound, should be avoided.
>
> Particular care should be exercised where children are involved in the depiction of violent behavior.[105]

More than two years later, the NAB's approval of this statement of principles has failed to have an effect on the amount of violence in television programming. Similarly, the National Cable Television Association (NCTA) recently adopted an "Industry Policy Statement" promising to discourage gratuitous violence in cable television programming.[106] This "Industry Policy Statement" has proven as ineffective as the NAB's voluntary measures. As is evident from the results of numerous recent studies on television programming such as those referred to supra, or even from casual observation of today's typical programming, this sort of voluntary regulation does not work. Due to the television industry's failure to effectively regulate itself, governmental action has become necessary to protect children from the harmful amounts of violence all too common in today's television programs.

54. The Commission cited its 1975 Report in its 1975 Memorandum Opinion and Order in Polite Society, in which it upheld a Broadcast Bureau ruling denying a request for a cease and desist order against television stations

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[105] Id. at 3-4.

[106] Harry A. Jessell, Cable Promises to Curb Violence, Broadcasting, Feb. 1, 1993, p. 33.

presenting excessively violent programming.[107] In Polite Society the Commission reaffirmed its "policy of self-regulation with regard to programming of sex and violence."[108] Similarly, the Commission eventually dismissed the Petitioner's 1969 Petition for Rulemaking on televised violence (RM-1515) in keeping with its decision to rely on industry self-regulation.[109] This is a policy decision that the Commission should now reexamine in light of the presently overwhelming consensus in the scientific community that televised violence is harmful to children and in light of the failure of industry self-regulation.

55. In 1984 the Commission recognized, in a report on a proposed children's programming guideline that would have set quantitative educational programming requirements, that the Commission has broad authority to regulate children's television programming in the public interest.[110] Still, the Commission continued to rely on industry self-regulation in this area as well:

> The consistency of such a guideline with the Communications Act and the First Amendment has never been squarely ruled upon, but it seems clear

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[107] In re Polite Society, 55 F.C.C.2d 810, 811 (1975).

[108] Id. at 812.

[109] See In the Matter of Council on Children, Media, and Merchandising On Request for Inspection of Records, 71 F.C.C.2d 44, 47 (1979)(referring to "recommendations as to the disposition of RM-1515 and Rm-2140, rulemakings on televised violence," in "Handwritten note dated April 14, 1976, from Karen Hartenberger to Wallace Johnson," et al.); FCC, Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 419 and 419 at n. 4 (1975); see also In Re Petition by the Foundation to Improve Television Concerning Violence on Television, 25 F.C.C.2d 830 (1970).

[110] In re Children's Television Programming and Advertising Practices, 96 F.C.C.2d 634 (1984).

> that a children's programming guideline would pass legal muster. It is hornbook law that the Commission's authority to promulgate rules, guidelines and policies is extremely broad, and that this expansive regulatory charter empowers the FCC to promulgate content-related requirements. Whether to adopt quantitative guidelines is a policy judgment within the FCC's discretion. The Commission's authority to adopt general guidelines governing children's television programming has previously been upheld, as has its power to single out such programming as a preferred category. In short, nothing in the Communications Act expressly prevents the Commission from promulgating a guideline for children's programming so long as it rationally furthers the public interest . . . . Nevertheless, the majority jettisons even a general requirement that children's educational programming be aired.[111]

The Commission issued rules imposing limits on commercials and requirements for educational and informational programming in children's television programming only after Congress required it to do so by enacting the Children's Television Act of 1990.[112] The Commission should not wait for Congress to end its inaction on televised violence while children are being harmed every day that violence on television goes unchecked.

56. The overwhelming consensus in the scientific community that televised violence is harmful to children and the manifest failure of industry self-regulation are not the only developments since the early 1970's that suggest the Commission should regulate programming that contains an excessive amount of dramatized violence. Changes in legislation and case law over the last twenty years indicate

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[111] Id. at 669-71.

[112] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990); 47 C.F.R. § 73.670-71 (1991).

that the Commission can now protect children from televised violence without fear of violating either § 326 of the Communications Act of 1934 or the First Amendment to the Constitution. These legal changes should prompt the Commission to reconsider its policy of non-regulation and issue the proposed Rules.

B. The Commission's Duty to Uphold the Public Interest Requires the Commission to Protect Children from Televised Violence.

57. The Commission's authority to issue regulations under the public interest standard is very broad. Under the Communications Act of 1934, the Commission is required to ensure that the "public interest, convenience, or necessity" is served by the exercise of its licensing power.[113] As further explained by the Supreme Court, this duty is of upmost importance and subject to broad interpretation: "There is no doubt that the main function of the Commission is to safeguard the public interest in the broadcasting activities of members of the industry."[114] Under 47 U.S.C. § 303(r), the Commission has the power to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of" the Communications Act as the "public

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[113] Nat'l Broadcasting Co. v. United States, 319 U.S. 190, 215 (1943)(citing §§ 307(a)(d), 309(a), 310, and 312 of the Communications Act of 1934).

[114] Nat'l Cable Television Ass'n v. United States, 415 U.S. 336 (1974); see also FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940); WOKO, Inc. v. FCC, 109 F.2d 665 (1939).

convenience, interest, or necessity requires."[115] Additionally, as the Court of Appeals explained in United Video,

> The Commission's power under § 303(r) is broad. Even before the 1984 Cable Act, which explicitly gave the Commission power over cable television, the Commission's § 303(r) powers had already been held to permit it to order a cable television station not to carry the signal of a broadcast station outside the broadcast station's primary market.[116]

The Commission itself recognized in 1984 that its power to regulate television in the public interest "is extremely broad," and its "expansive regulatory charter empowers the FCC" to regulate "children's television programming."[117] While the proposed Rules do not concern only children's programming, they are primarily designed to serve the same end as other regulations targeted more specifically at children's programming such as 47 CFR § 73.671, namely, the welfare of children in the television audience. As noted by the Commission in 1985, "children watch a substantial amount of television that is not specifically programmed to meet their needs or interests."[118] The Petitioner submits that the public interest requires regulating violence in programming not targeted at children and that the Commission has the authority to issue the proposed Rules under the

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[115]United Video, Inc. v. FCC, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989).
[116]Id. at 1183. See also United States v. Southwestern Cable Co., 392 U.S. 157 (1968).
[117]96 F.C.C.2d 634, 669-71 (1984).
[118]In the Matter of Petition for Rulemaking Pertaining to a Children's Advertising Detector Signal, 100 F.C.C.2d 163, 168 (1985).

public interest standard. The Commission is empowered to issue Rule 6, which concerns educational and informational programming, by the Children's Television Act of 1990 as well. As noted elsewhere herein, the Commission has previously recognized that it has the power to regulate televised violence, but has not done so because of now inapplicable First Amendment concerns.

58. The Commission's responsibility to regulate television in the public interest extends to cable as well as broadcast television.[119] This responsibility to the public interest even requires the Commission to ensure that broadcasting relayed by communication satellites serves the public interest.[120] Accordingly, the proposed Rules are designed to protect children from television programs containing an excessive amount of dramatized violence transmitted by any of the methods of telecasting over which the Commission has authority. Opponents of cable regulation may attempt to argue that the Commission is prohibited from regulating excessively violent programming on cable television by 47 U.S.C. §544(f)(1) which reads, "Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided by this subchapter." However, § 544(f) does not prohibit regulations that are

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[119]United States v. Midwest Video Corp., 406 U.S. 649, 670-71 (1971).
[120]Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1475 (D.C. Cir. 1984).

content-neutral for First Amendment purposes.[121] As explained infra, the Rules proposed by the Petitioner are content-neutral under current First Amendment case law because they are justified by the government's interest in preventing harm to children rather than by the government's disagreement with any messages being conveyed by programs containing dramatized violence.[122] Thus, § 544(f)(1) is not an obstacle to the Commission's issuing the proposed Rules.

59. Cable industry representatives may also argue that cable television should not be regulated to protect children from violent programming, on the dubious ground that cable programming is somehow different from broadcast programming because viewers subscribe to cable programming but not to broadcast programming. A moment's reflection will reveal the flaws in this argument. The differences in the means by which the two kinds of programming are paid for and brought into the home are irrelevant for purposes of the most persuasive argument for regulating indecent or excessively violent programming: both are potentially harmful to children and governmental regulation is the only effective way to ensure that children are not harmed by either. In Pacifica the Supreme Court reasoned that the Commission could protect children from indecent radio programming because radio programming is pervasive in our society and

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[121] United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989).

[122] See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)(citing Clark v. Community for Creative Nonviolence, 468 U.S. 288, 295 (1984)).

parents are unable to ensure that their children are not exposed to objectionable material.[123]

60. The regulation upheld in Pacifica was issued pursuant to both 18 U.S.C. § 1464's prohibition on indecency and the public interest standard.[124] While cable programming must be invited into the home by subscribing to a cable service, radio programming must be invited into the home by buying a radio. In both cases the recipient must take affirmative steps and incur costs to receive the programming. Additionally, parents are currently as incapable of predicting in advance the amount of violence in cable programs as they are of predicting the number of "dirty words" in radio programs. Furthermore, children are likely to watch television without supervision just as they are likely to listen to radio programs without supervision.[125] The viewer advisories, visual warning signals, and classification standards provided for by the proposed Rules would help parents predict in advance the amount of violence in programming their children might watch. Still, restrictions on the amount of violence in television programming are necessary because parents cannot be expected to constantly monitor their children's television viewing.

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[123]FCC v. Pacifica Foundation, 438 U.S. 726, 841 (1978)(the regulation upheld in Pacifica was issued by the Commission pursuant to both 18 U.S.C. § 1464 and 47 U.S.C. § 303(g)).

[124]Id.

[125]See Nat'l Coalition on Television Violence, 13, No. 1-4, Nat'l Coalition on Television Violence News 9 (1992).

61. Since the Commission initially declined to regulate televised violence in the 1970's, the evidence has become overwhelming that violent television programming is a serious social problem, particularly with regard to children. As made clear by the alarming research results, findings, and statistics such as those referred to supra, regulating excessively violent television programming during children's viewing hours is in the public interest. Two recent acts of Congress designed to improve children's television programming and mitigate the effects of televised violence suggest that industry self-regulation has been inadequate to protect children's interests. The Children's Television Act of 1990 imposed quantitative limits on advertising in children's programming and required consideration of service to "the educational and informational needs of children" in licensing proceedings.[126] The Television Program Improvement Act of 1990 granted a three-year exemption from antitrust laws to "persons in the television industry" for collaborating on "developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material."[127] If industry self-regulation were sufficient to safeguard children's interest in healthy television programming, these acts would have been unnecessary.

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[126]Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-97, §§ 102, 103(a) (1990).
[127]Television Program Improvement Act of 1990, Pub. L. No. 101-650, 104 Stat. 5127, § 501(c) (1990).

62. Pursuant to the Children's Television Act of 1990, the Commission issued regulations concerning "commercial limits in children's programs" and "educational and informational programming for children" in 1991.[128] Section 73.671 defines "educational and informational television programming" as "any television programming which furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/ cognitive or social/emotional needs."[129] Still, however beneficial this sort of general attention to the needs of child television viewers may be, children continue to be harmed by televised violence. Encouraging the television industry to offer generally beneficial programming will not solve the problem of televised violence or undo the harm already done and currently being done to children. 47 CFR § 73.671, issued pursuant to the Children's Television Act of 1990, is an inadequate means of requiring beneficial programming that would specifically help to alleviate the harm done by televised violence. Rule 6 of the Petitioner's proposed Rules would require telecasters to provide some educational and informational programming specifically designed to address the problem of televised violence. It is worth noting here that the Children's Television Act assumes that the Commission has the authority to issue quantitative advertising limitations for cable as well as

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[128]47 C.F.R. §§ 73.670, 73.671 (1991).
[129]47 C.F.R. § 73.671 (1991).

broadcast television: "As used in this section, the term 'commercial television broadcast licensee' includes a cable operator, as defined in section 602 of the Communications Act of 1934 (47 U.S.C. 522)."[130]

63. The television industry's failure to take meaningful action under the antitrust exemption granted by the Television Program Improvement Act is but one more indication of the ineffectiveness of industry self-regulation. Last year, Senator Paul Simon of Illinois, the sponsor of the Act, had the following to say about the industry's response to the exemption:

> First of all, it is interesting that we had the resistance at least privately, if not publicly, of most of the television industry, not all of it, to even having an exemption from the antitrust laws. . . . I think it is worthwhile asking what has happened. . . . The honest answer is not very much. The National Association of Broadcasters hosted a meeting in which its statement of principles were distributed. The three networks have pledged to get together to compare standards. The meeting was to have occurred in April. It has now been postponed until July. They are inching forward, but I am not sure, candidly, whether they are just making motions so it looks like they are doing something so we do not pay any attention in Congress to what is occurring.[131]

An agreement announced in December of 1992 by ABC, CBS, and NBC supposedly sets standards for violence in programming for the three networks, but this agreement has yet to produce results, and the industry's track record strongly suggests that it will not reduce the amount of violence in

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[130]See Children's Television Act of 1990 at § 102(d).
[131]138 Cong. Rec. S9172 (daily ed. June 30, 1992).

television programming.[132] The same is true of the NAB's 1990 voluntary programming principles and the NCTA's 1993 policy statement.[133] The television industry's continuing failure to voluntarily reduce the amount of violence on television, in spite of its repeated assurances that it intends to do so, indicates that regulatory action by the Commission is necessary. The 1993 February sweeps period only confirms the need for such action.

64. The Commission cannot continue to entrust the protection of children's interests, and by extension the public interest, to the television industry and marketplace checks and balances. Industry self-regulation has manifestly failed to "obviate any need for government regulation," as the Commission hoped it would in 1975.[134] In light of this failure, the Commission appears to be neglecting its regulatory duties with its continuing inaction on the problem of televised violence. In 1984 the Court of Appeals held, in Wold Communications, that "the public interest touchstone of the Communications Act" permits the Commission to "allow the marketplace to substitute for direct Commission regulation" with respect to satellite transponder sale applications.[135] However, the

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[132]See TV Networks Set Standards on Violence, Boston Globe, Dec. 12, 1992.
[133]See Nat'l Assoc. of Broadcasters, 88/90 News at 1 (June 21, 1990); H. Jessell, Cable Promises to Curb Violence, Broadcasting, Feb. 1, 1993, p. 33.
[134]See 1975 Report, 51 F.C.C.2d at 422.
[135]Wold Communications, 735 F.2d at 1475-76.

court emphasized that its holding was based on the assumption that the Commission had "not foresworn regulation or slighted its obligation to forecast where the public interest lies, and it stands ready to alter its course if future developments indicate that the public interest is not advanced by its decision."[136] The Commission's initial position on regulating televised violence is now twenty years old, and developments both in research on the effects of televised violence and in First Amendment case law suggest that this position should now be abandoned. With the Wold decision in mind, the Commission should take care not to abandon the public interest altogether by failing to reconsider the position on televised violence it tentatively adopted in the 1970's.

65. The numerous studies on the effects of televised violence discussed supra and the failure of industry self-regulation require the Commission to take decisive action. Restrictions on violent programming must be enforced, and some educational and informational requirements must be targeted at televised violence. The Commission should recognize that the television industry has failed to regulate itself with respect to violent programming and end its now untenable reliance on self-regulation.

C. The Commission Should Issue the Proposed Rules to Protect the Fifth Amendment Right of Children to be Free from Mental

[136] Id. at 1475.

Harm Caused by Exposure to Excessive Dramatized Violence on Television.

66. In 1969 the Petitioner, in an earlier Petition for Rulemaking concerning televised violence, argued that the Fifth Amendment's protection of children's liberty interest in being free from mental harm required the Commission to regulate violence in television broadcasts.[137] That earlier Petition was eventually dismissed by the Commission as it settled into its policy of relying on industry self-regulation in the mid-1970's. In 1972 this Fifth Amendment argument was made again before the Court of Appeals in Maguire v. Post Newsweek Stations.[138] "Without reaching the merits" of the Fifth Amendment argument, the Court of Appeals affirmed the judgment of the court below that had "dismissed the suit for failure to exhaust available administrative remedies."[139] However, the Court of Appeals also noted, "Should appellants remain dissatisfied with the [Federal Communication] Commission's disposition of their complaint, or should the Commission unreasonably delay action on it . . . this court stands ready to vindicate the constitutional and statutory rights of the parties."[140]

67. The Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due

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[137]Found. to Improve Television, Petition for Rulemaking, RM-1515 at 42-43 (filed with the FCC Oct. 7, 1969, dismissed several years later in favor of industry self-regulation).
[138]Maguire v. Post Newsweek Stations, Capitol Area, Inc., 24 R.R.2d 2094 (D.C. Cir. 1972).
[139]Id. at 2094-95.
[140]Id. at 2095.

process of law," and § 151 of the Communications Act of 1934 provides that one of the paramount duties of the Commission is the "protection of life."[141] The term "liberty" extends to the full range of individual conduct.[142] It "embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of [one's] faculties as well."[143] In Meyer v. Nebraska, the Supreme Court said,

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[144]

Is is clear from the decisions referred to supra that the concept of "liberty" is given a broad meaning by the courts and embraces all forms of legitimate conduct. While no case has held that the right to be free from mental harm is included within the terms "life" and "liberty", it would be illogical to exclude it. One cannot very well engage in the pursuit of happiness with a mental imbalance brought about by years of exposure to television murder and mayhem.

68. As matters now stand, children have been and are being deprived of their right to be free from mental harm

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[141]U.S. Const. amend. V; 47 U.S.C. § 151 (1988).
[142]Bolling v. Sharpe, 347 U.S. 497 (1954).
[143]Grosjean v. Am. Press Co., 297 U.S. 233 (1936).
[144]Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

without due process of law. Each time a television program containing an excessive amount of dramatized violence is received in our Nation's homes, youthful viewers receive another dose of emotional harm, with an accompanying degenerative effect to their mental processes. Their senses are dulled, and immunity to actual violence results. The Commission should act immediately to prevent any further such harm and the social ills that accompany it.

69. In FCC v. Pacifica Foundation, the Supreme Court recognized that one's First Amendment right to be left alone in one's own home "plainly outweighs the First Amendment rights of an intruder."[145] Additionally, the government's "substantial interest in protecting its citizens from unwelcome noise," is strongest in the context of protecting children from unwelcome noise in their own homes.[146] In Frisby the Court noted that it has "repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom."[147] Surely the right to be free from mental harm is as important as the right to be left alone. As the Fifth Circuit Court of Appeals explained,

> The constitution protects not simply words but communication, which presupposes a speaker and a

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[145]Pacifica, 438 U.S. at 748(citing Rowan v. Post Office Dept., 397 U.S. 728 (1970)).
[146]Id. at 491(citing Frisby v. Schultz, 487 U.S. 474, 484 (1988); Carey v. Brown, 447 U.S. 455, 471 (1980)).
[147]Frisby, 487 U.S. at 484(citing Pacifica, 438 U.S. at 748-49, 759-60; Rowan v. Post Office Dept., 397 U.S. 728, 730 (1970); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949)).

> listener, and circumscribes this protection for purposes which enhance the functioning of our republican form of government. The "rights" of the speaker are thus always tempered by a consideration of the rights of the audience and the public purpose served, or disserved, by his speech.[148]

In Roe v. Wade the Supreme Court explained that the right to privacy extends to fundamental personal rights "implicit in the concept of ordered liberty."[149] The liberty interest in the enjoyment of one's faculties is such a fundamental personal right. The right to be free from mental harm is at least as important to ordered liberty as the right to be left alone in one's home. In Cox v. Louisiana, the Supreme Court declared,

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place or at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.[150]

Balancing liberty and free speech may be a delicate task if the speech involved is political or editorial, but portrayals of dramatized violence do not involve the same kind of First Amendment concerns.

70. The television industry's First Amendment interest in exposing children to dramatized violence is minimal at best. By themselves, acts of violence do not concern any

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[148]Martin v. Parrish, 805 F.2d 583, 584 (5th Cir. 1986).
[149]Roe v. Wade, 410 U.S. 113, 152 (1973)(citing Palko v. Conn., 302 U.S. 319, 325 (1937)).
[150]Cox v. Louisiana, 379 U.S. 536, 554 (1965).

particular issue or advocate any particular point of view, and they have little, if any, relevance to the free exchange of ideas, which the First Amendment is designed to protect.[151] However, as many of the findings referred to supra suggest, excessive dramatized violence on television poses a serious threat not only to children's liberty interest in being free from mental harm, but liberty itself. Increased aggressiveness and desensitization to violence are two well-documented results of the mental harm caused by exposure to excessive dramatized violence.[152] The riots in Los Angeles and elsewhere in the Summer of 1992 should serve as a warning of what may become of our liberty if violence continues to pervade our popular culture and our nation's youths continue to be exposed to violent television programming.

71. By failing to regulate the amount of dramatized violence shown on television in spite of its duty to regulate television in the public interest, the Commission is denying our nation's children their Fifth Amendment right to be free in the enjoyment of their faculties. As the Supreme Court has recognized, "Minors, as well as adults, are protected by the Constitution and possess constitutional

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[151]See FCC v. League of Women Voters, 468 U.S. 364, 381 (1984).

[152]See, e.g., Nat'l Inst. of Mental Health, Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties, (D. Pearl, L. Bouthilet & J. Lazar, eds 1982); Am. Psych. Ass'n, Big World, Small Screen, in Report of the American Psychological Association Task Force on Television and Society (1992).

rights."[153] The evidence referred to supra should be sufficient to establish that exposure to excessive televised violence can significantly impair children's enjoyment of their mental faculties. Any limited First Amendment free speech interest the television industry may have in exposing children to portrayals of dramatized violence is outweighed by children's Fifth Amendment liberty interest in being free from mental harm.

D. The Commission May Regulate the Transmittal of Televised Violence Without Violating § 326 of the Communications Act of 1934 or the First Amendment to the Constitution.

72. Even more than uncertainty about the effects of televised violence or hope that industry self-regulation would prove effective, fear of violating the First Amendment was behind the Commission's initial refusals to regulate not just televised violence, but programming for the benefit of children generally. In 1974 the Commission declined to adopt quantitative guidelines for educational children's programming because it considered children's programming "a sensitive First Amendment area."[154] However, this concern, although perhaps a valid reason for caution in the early 1970's, does not, particularly in light of subsequent developments in First Amendment case law, prevent the Commission from issuing the proposed Rules. One indication

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[153]Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

[154]Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 6 (1974).

that the Commission's fear of violating the First Amendment may have been unwarranted is that the Children's Television Act of 1990, which requires quantitative limits on commercial material shown during children's programming, has not been found to violate the First Amendment. The Petitioner's proposed Rules have been carefully drafted to restrict violent programming to the extent necessary in order to protect children without restricting programming that has not been shown to be harmful to children. The Rules are designed to balance any limited First Amendment interest the television industry might have in exposing children to excessive amounts of dramatized violence with the important competing social interests of protecting children from mental harm and alleviating societal problems stemming from that harm.

73. In 1975 the Commission reaffirmed the position it took on regulating televised violence in its 1972 Corey decision.[155] In its 1975 Report on the Broadcast of Violent, Indecent, and Obscene Material, the Commission concluded that it should not regulate televised violence because, in addition to hoping that self-regulation might prove adequate, the Commission thought "government-imposed limitations" on televised violence would "raise sensitive First Amendment problems."[156] In the same Report, the Commission explained that it considered its ability to

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[155]See In re Corey, 37 F.C.C.2d 641, 644 (1972).
[156]51 F.C.C.2d 418, 420 (1975).

regulate televised violence, "by applying the public interest standard to programming," to be limited by the anti-censorship provision of § 326 of the Communications Act of 1934.[157] The Petitioner submits that regulating televised violence, which is well-documented as harmful to children, raises fewer First Amendment and censorship problems than regulating indecency in radio programming, which is not well-documented as harmful to children.[158]

74. Later in 1975, the Commission, in Polite Society, denied an application for review of a ruling by the Commission's Broadcast Bureau that had denied a request for the Commission to require its licensees to justify violent programming.[159] The Commission cited its 1975 Report and noted that the Commission was guided "by past decisions distinguishing obscenity, indecency, and profanity from that material which is protected by Constitutional guarantees of freedom of speech and of the press."[160] As explained infra, these past decisions are no longer the best precedents upon which to base a well-considered position on regulating televised violence. The now overwhelming consensus in the scientific community that televised violence is harmful to children and the manifest failure of industry self-regulation undermine the assumptions upon which some of

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[157]Id. (citing Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1976); Columbia Broadcasting v. Democratic Nat'l Comm., 412 U.S. 94 (1973)).
[158]See Pacifica, 438 U.S. 726 (1978).
[159]In re The Polite Society, 55 F.C.C.2d 810 (1975).
[160]55 F.C.C.2d at 813.